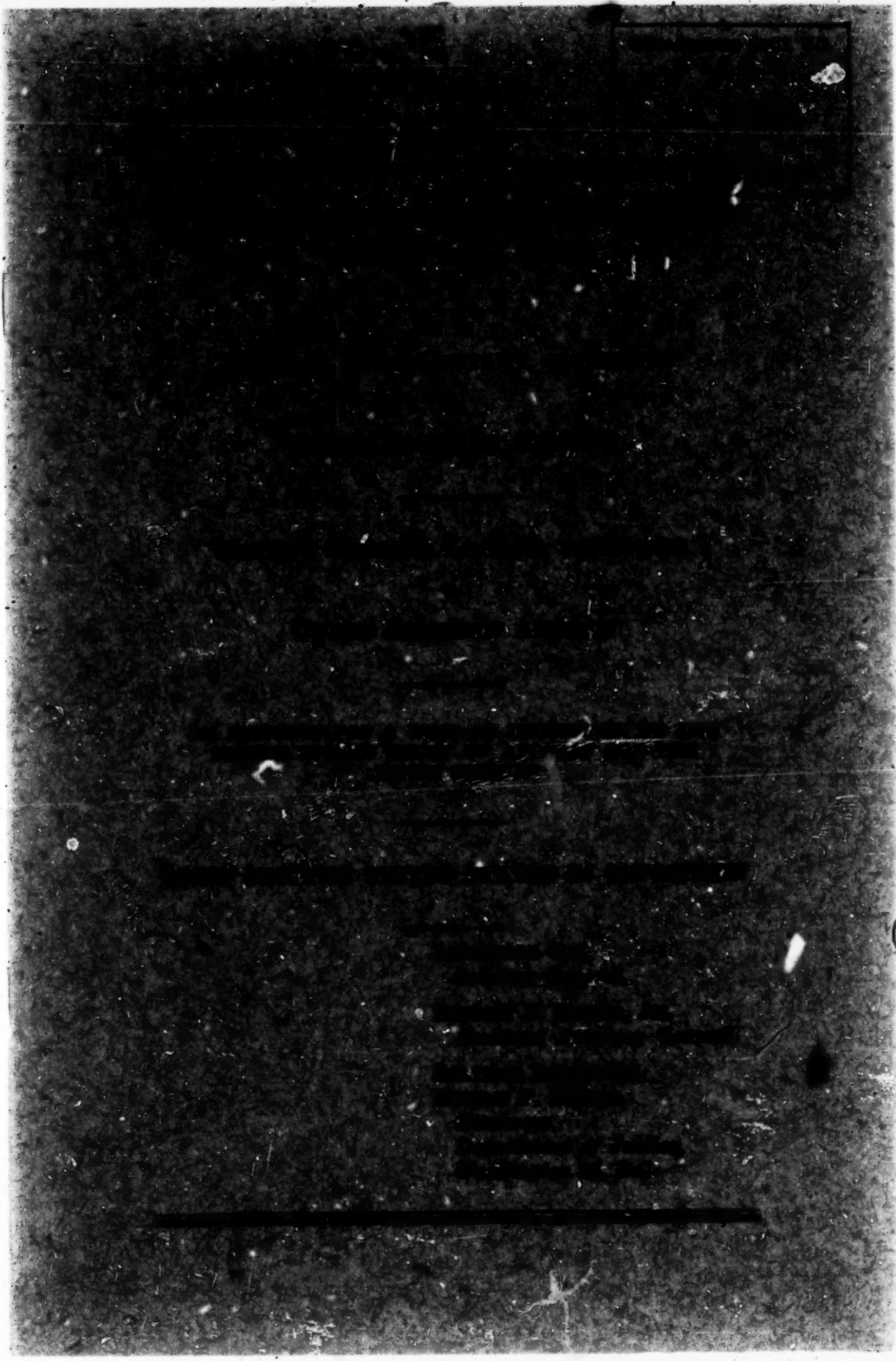

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 203

IMPERIAL MEAT COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

MATHEW HERBERT LANDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion in the court of appeals is reported at 316 F. 2d 435.

JURISDICTION

The judgments of the court of appeals were entered on April 22, 1963. A petition for rehearing was denied May 13, 1963. The petition for a writ of certiorari was filed on June 11, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the venue of petitioners' trial was properly laid in the United States District Court for the District of Colorado.

2. Whether the trial court erred in permitting certain witnesses to refresh their recollections from their reports and notes.

3. Whether the trial court erred in admitting into evidence as business and official records purchase invoices of the corporate petitioner.

4. Whether there was sufficient evidence to support the conviction of petitioner Landers.

STATEMENT

Petitioners and one Bethley were convicted in the United States District Court for the District of Colorado of presenting false and fraudulent claims (for payment for meat) to a department of the United States government, in violation of 18 U.S.C. 287.[1]

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[1] "§287. *False, fictitious or fraudulent claims.* Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the

The corporate petitioner was fined $7,500. Petitioner Landers was sentenced to imprisonment for one year and one day. The court of appeals affirmed.

The corporate petitioner was engaged in the business of fabricating boneless beef, and a major portion of its business was supplying the Department of the Army. Petitioner Landers was the president and chief stockholder of the corporation. Bethley was hired by Landers as plant superintendent (Tr.-XIV 657-659). Under its contracts, petitioner was to supply the Army with U.S.D.A. Grade Choice. The eighteen counts of the indictment involved eighteen shipments by petitioners to the Army, which, upon inspection, were found to contain inferior grades of beef. These shipments occurred over a period of several months.

The first phase of the government's case consisted of the testimony of ten veterinarians and two assistants from the United States Army Veterinary Corps, each of whom had examined, at the destination point, all or part of one or more of the eighteen shipments (Tr.-II 186 to Tr.-VII 919). Their testimony was that their examinations revealed grade stamps of lower grade beef than was called for under the contracts, considerable evidence of the removal of grade rolls, and cuts of meat bearing no grade roll where it would normally be expected to appear. Photographs of some cuts of beef inspected were displayed to the

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United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

jury as well as a small number of pieces of the actual meat. The testimony of these officers and enlisted men was corroborated by the testimony of fifteen employees of the corporate petitioner who told of deliberate stripping of grade rolls from inferior grades of beef under orders from the defendant Bethley (Tr.-VII 928 to Tr.-X 1513).

The government also introduced records of the corporate petitioner and invoices sent by various suppliers (Tr.-I, 11; Tr.-XVII 5, 34). These showed that, during the period in question, the corporate petitioner did not buy enough "choice" beef to fulfill the government contracts.

ARGUMENT

1. The indictment, which showed on its face that the invoices claimed to be false had been presented to the Department of the Army in Kansas City, Missouri, alleged that each offense had been committed in Colorado. The proof showed that the invoices had been prepared in Colorado (the office of the corporation) and mailed to the Department of the Army in Missouri. Petitioners, relying on *Travis* v. *United States*, 364 U.S. 631, argue that this proof did not show venue in Colorado.

Travis, however, involved a prosecution under 18 U.S.C. 1001 for making a false statement in a non-Communist affidavit which, under Section 9(h) of the National Labor Relations Act, had to be *on file* with the Board in Washington before the Board had jurisdiction over a union. In these circumstances, the Court held, the matter was not one within the

jurisdiction of the Board until the affidavits were on file, and a violation of 18 U.S.C. 1001 could occur only in Washington, D.C. The Court specifically noted that Section 9(h) of the National Labor Relations Act did not require union officers to file non-communist affidavits, saying that, if it had, "the whole process of filing, including the use of the mails, might logically be construed to constitute the offense." (364 U.S. at p. 635).

This case falls within the rationale of the above-quoted sentence. The preparation and mailing of the false claim was part of the total offense growing out of a pre-existing relationship between petitioners and the Department of the Army which arose under the contracts. Venue was therefore governed by 18 U.S.C. 3237(a), which provides that offenses commenced in one district and completed in another may be prosecuted in any district in which the offense was begun, continued, or completed. See *Henslee* v. *United States*, 262 F. 2d 750 (C.A. 5), certiorari denied, 359 U.S. 984; *United States* v. *Miller*, 246 F. 2d 486 (C.A. 2), certiorari denied, 355 U.S. 905. The offense here is similar to the offense of tax evasion which is deemed to be committed in any area "through which [the] force propelled by an offender operates". See *United States* v. *Gross*, 276 F. 2d 816, 819 (C.A. 2).

2. Ten veterinarians and two assistants testified concerning examinations of particular shipments of meat on which one or more counts of the indictment were based. The witnesses in each instance stated that they themselves found and saw sub-standard cuts of meat and cuts either bearing no grade stamps or

a telltale indication that a stamp had been cut off. In many cases, the witnesses identified photographs of such cuts.

Petitioners argue (Pet. 6-10) that some of the witnesses testified not from present recollection, but from reports made to their superiors as to such details as the number of boxes opened, the number of cuts of meat in each box and the numbers of substandard or non-stamped items. At the trial petitioners made no such objection and no motion to strike the testimony of Dr. Hagar, who investigated the shipments which formed the basic count, No. XII (Tr.-V 619-655), or the testimony of Mr. Blinkhorn who testified as to count XVII (Tr.-VI, 849-862). Nor was the admission of the testimony of these witnesses challenged on appeal. Since either one of these counts, standing alone, supports the verdict, the question raised is not really presented by this case.

In any event, as discussed more fully in the opinion below, the objection to the testimony is without merit. There is no question that each witness did personally make inspection [2] and did have a present recollection of the fact that in each instance he found substantial proportions of meat that did not live up to specifications. The absence of recollection related only to immaterial details such as the number of cuts, the number of boxes examined, etc.

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[2] When one witness, Major Seymour, testified that he was present during examination of grill steaks but not roasts, the court confined his testimony to the inspection of steaks (Tr.-IV, 543-544).

3. Section 1732 of Title 28 makes admissible as evidence of a transaction (in this case, the sale of beef to petitioner) any writing made in the regular course of business. The invoices, as to the admission of which petitioners complain, clearly come within the provisions of this statute. The objection of the petitioners goes to the weight to be accorded this evidence and in no way affects its admissibility.

4. A corporation can act only through its officers or agents. In this case the evidence showed that petitioner Landers was a fifty-percent stockholder of Imperial (Tr.-XI, 152). He was, also, the active operating head of the company, made the decisions as to the purchasing of beef from suppliers and the bidding for contracts to sell beef to the Government, and otherwise supervised the company's affairs (Tr.-II, 123, 129, Tr.-VIII, 1102-1103, 1109, 1114, 1119, 1122, 1141, 1151). The evidence also showed that not enough choice beef was purchased to meet the requirements under the government contracts - - - - a matter which must have been known to Landers.

The jury had ample basis for concluding that Bethley, who was an employee of the corporation, was not solely responsible for the scheme to supply the Army with inferior beef. The scheme, one could scarcely doubt, was the product of one of the owners, who would reap the financial benefits of the fraud. In addition to Landers, there were two other stockholders who each owned 25 per cent of the stock. However, neither was active in the management of the corporation, and both denied any knowledge of the fraud (Tr.-XI, 151-153, 158-159). The evidence was suffi-

cient to support the conviction of petitioner Landers, who had long experience in the business, supervised its affairs and had a close relationship with Bethley.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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